

Committee on Education and the Workforce
Hearings

Testimony of Mr. Marc L. Fleischaker
National Association of College Stores

U.S. House of Representatives
Committee on Education and the Workforce
Subcommittee on 21st Century Competitiveness

Hearing on
"Are College Textbooks Priced Fairly?"

July 20, 2004

Mr. Chairman and Members of the Subcommittee:

On behalf of the National Association of College Stores ("NACS"), I thank you very much for inviting me to appear today. My name is Marc L. Fleischaker, and I am a partner in the law firm of Arent Fox, in Washington, D.C. I have been the legal counsel for NACS for many years.

NACS is a national trade association headquartered in Oberlin, Ohio. NACS represents all retailers whose primary business is to sell to higher education students. This includes institutional stores (owned by the college or university), stores leased to private operators, and private stores located on or near college campuses. NACS has approximately 3,200 store members, which constitute some 90% of the stores serving the higher education community.

The role of all college stores, regardless of their ownership or management structure, is to contribute to the education function of the university, the faculty, and the university students that they serve. In that context, NACS has been concerned for several years about the escalating costs of higher education, including the costs of course materials, primarily textbooks. In that connection, early this year the NACS Board of Trustees specifically reiterated that one of its primary objectives is to continue to work to reduce the cost of course materials for students. NACS believes that this hearing will assist in that objective by shedding additional public light on the issues.

It is also important to point out that NACS has a long, positive relationship with textbook publishers, represented by the Association of American

Publishers. Of course, that does not mean that publishers and retailers agree on every issue. But it does mean that NACS looks forward to working with AAP in appropriate ways to address the issue of textbook prices.

The pricing of college textbooks is affected by many factors, including the quantity of new books which are sold, the sale of used books, authors' royalties, increases in the cost of producing books, "sell-through" of books to students, the frequency of new editions, the "bundling" of other products (such as compact disks) with the textbook, and the margins obtained by the collegiate retailers.

One note about those margins before I move to the specific topic which I have been asked to address. College books are sold on either a "pre-priced" basis in which the intended retail price is on the book itself, or on a net-priced basis where the book cover does not contain a price. When books are pre-priced and sold to retailers on the basis of a discount from the preprinted retail price, most publishers provide college stores with only a 20-25% discount from the preprinted retail price. That discount is approximately half the discount provided to trade stores for the sale of books not intended for classroom adoption. In those situations, of course, the bulk of college stores would sell the book to students at the preprinted price, achieving a margin of 20-25 percent. When books are sold to stores on a net price basis with no preprinted retail price, stores are, of course, free to charge whatever price they feel is appropriate, and different college stores charge different amounts. However, based on industry surveys, the "average" markup for all textbooks has remained approximately 22% for many years, meaning that college stores are charging approximately the same margin for net priced books than for pre-priced books. For these reasons, it would be extremely difficult to conclude that the margins earned by college stores are the primary causative factor in the escalating price of textbooks. (That margin, of course, is used to fund all store operations, including staff salaries.) Of course, college stores do attempt to give their students options by selling used books. To the extent that this reduces the number of new books that are sold, thereby causing publishers to charge even higher prices for new books, college bookstores would probably plead guilty to attempting to increase lower price options for their student-customers.

I have been specifically requested to address the question of discrepancies between the prices of textbooks sold in the United States and overseas, the effects of that discrepancy on the cost of post-secondary education, and possible solutions.

It is indisputable and acknowledged by textbook publishers that most engage in dual pricing of textbooks. Not unlike the drug industry (although it does not occur in Canada, where textbook prices are comparable to those in the U.S.), textbooks are often sold overseas at a fraction of the cost they are sold in the United States. This practice has been described as "traditional" by representatives of the publishers, but I do not personally know how long it has been happening. The actual prices of textbooks sold for overseas distribution apparently vary, and precise statistics would have to be provided by publishers. However, we understand that many textbooks sold for distribution overseas are priced at from 20-40 percent of the price for textbooks sold for distribution in North America.

While this practice has apparently continued for many years, NACS only became fully aware of and concerned about the practice several years ago. NACS became aware of, and troubled by, the dual pricing policy when the internet became fully operational as an alternative source of textbooks for college students. Several international sources for textbooks sprang up, including such well-known sites as amazon.uk, and students began to notify college booksellers about available prices. Very quickly thereafter, distributors began selling textbooks purchased overseas back to the U.S. at very low prices that enabled U.S. students to buy at prices well below the prices at which college bookstores themselves were able to purchase directly from the publishers. College stores generally watched this development with great anguish—not only did it adversely affect their own sales, but it generated complaints from students who assumed that the college store must be "price gouging," when, in fact, the college store could not even purchase the book at as low a price as a student could purchase the book from overseas sources.

It is difficult for NACS to estimate the number of students purchasing books at lower prices from overseas sources. College stores continue to have the natural advantages of proximity to the students and the willingness to accept returns when the student drops the class or decides not to use the book. (Some students actually buy books from overseas or other sources and then try to return them to the college store.) We would estimate that textbooks purchased from sources originating overseas account for approximately 5 percent of textbooks which are sold, and that number is likely to grow.

In an attempt to address the problem I wrote letters to a number of major textbook publishers in December 2002, noting that the sale of textbooks from non-U.S. sources was becoming increasingly more prevalent, and that there was no apparent good reason to "justify treating foreign and U.S. textbook markets differently beyond the fact that it has been feasible to do

so." We recommended that the practice of offering more favorable pricing to overseas distributors be discontinued. As a second option, we suggested that, at the very least, publishers take steps to assure that textbooks sold into overseas markets at more favorable prices be prevented from being resold back into the U.S. for use by college students. Frankly, I did not receive a congenial response. No individual publishers responded to my letter. Instead, I received a response from AAP stating that AAP could not discuss pricing issues collectively because of the antitrust laws. The letter went on to suggest that the problem could be caused, at least in part, by the so-called "first sale" doctrine, which limits the copyright holder's ability to enforce its copyright rights to purchasers not buying directly from the copyright holder. The letter concluded by noting that the publishers' and retailers' interests were similar and that the difficulty in finding solutions "will only be exacerbated if our efforts to find mutual relief are complicated by fruitless disputes over legitimate and well-established price differential practices."

Subsequent to this exchange, the NACS Board of Trustees, in March 2003, adopted a resolution deploring "the sale of identical or virtually identical college textbooks to foreign wholesalers and retailers at prices significantly lower than those available to domestic wholesalers and retailers." Since then, NACS has continued to seek ways to work with the publishers to explore possible solutions to the re-importation problem. On October 21, 2003, the New York Times published a major, front-page story about this issue that placed the major responsibility for higher textbook prices on the publishers. The AAP responded by assigning much of the blame to college bookstores, because of margins and the proliferation of used books. Unfortunately, this "war of words" appears to have impeded cooperative efforts by publishers and retailers to address the problem.

Our understanding is that the dual pricing system continues. Some publishers have apparently amended their distribution agreements to make re-importation back into the U.S. more explicitly violative of the agreement, and we are aware of several threatened or actual lawsuits filed by publishers against distributors re-importing textbooks back into the U.S. NACS is not aware of the results of these individual efforts. The "traditional" two-price system under which the same book is sold overseas at a significantly lower price than it is sold in the U.S. continues to be the prevalent business practice of the major higher education publishers. Based on anecdotal evidence, it does not appear that the re-importation problem has been reduced from 2-3 years ago. By the same token, of course, continuation of the dual pricing system keeps textbook prices for most U.S. college students significantly higher than they are for students

overseas, whether in Mexico, Southeast Asia, or Western Europe.

NACS is not seeking a legislative solution to this problem at the current time. We continue to want to work cooperatively with our textbook publishers to lower the prices of textbooks, while protecting the legitimate interests of publishers, authors, distributors, college stores, and college students. We believe that progress is achievable.

However, NACS does believe that the dual-pricing system, even if well-intentioned, is unfair. Like publishers, NACS wishes to encourage reading and education in underdeveloped countries, and can understand the desire to encourage education and discourage counterfeiting by discounting prices to some extent in those areas. This desire, however, does not justify steeply lower prices to distributors and students in Western Europe, for example. Low prices in order to discourage counterfeiting or other improper reproductions of books in countries such as Mexico, China, and India

are no substitute for more aggressive and satisfactory intellectual property protection in those countries. If textbooks, like movies, can be copied with impunity, then the industries themselves and the great American intellectual achievements they represent will ultimately be in jeopardy.

U.S. and Canadian college students should not, by themselves, be made to suffer the consequences of underdeveloped countries' inability or unwillingness to enforce their laws. In fact, higher prices in the U.S. are also leading to improper copying of books and many U.S. students deciding to forego acquiring textbooks altogether. All segments of the textbook industry should be working together to see how we can best maintain the extraordinary high quality of U.S. higher education—which is the envy of the world—without making the price of that education prohibitive to many Americans. Textbook prices should not be ignored in this discussion.

For these reasons, I want to again express NACS' appreciation to this Subcommittee for shedding light on this issue and encouraging discussion of a topic that begs for broad cooperation as we seek a solution.